

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs October 25, 2006

MICHAEL ANTHONY BUSH v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 2002-A-520 Cheryl Blackburn, Judge

No. M2005-02925-CCA-R3-PC - Filed January 4, 2007

The Petitioner, Michael Anthony Bush, was indicted by a Davidson County grand jury for eight counts of aggravated burglary and two counts of burglary. He was tried on one count of aggravated burglary and was convicted and sentenced to nine years in the Department of Correction. Subsequently, the Petitioner pled guilty to four additional counts of aggravated burglary, and he received an effective sentence of twenty-seven years in the Department of Correction. In his petition for post-conviction relief, the Petitioner alleges several claims of ineffective assistance of counsel: (1) trial counsel did not adequately investigate the facts of the case by failing to present expert testimony to challenge the State's fingerprint evidence; (2) trial counsel did not adequately inform him of the State's fingerprint evidence during the plea-bargaining stage; (3) trial counsel did not allow him to testify at trial; (4) trial counsel did not inform him that, if he did not testify, he would not receive a jury instruction on aggravated criminal trespass; (5) trial counsel did not seek a psychological examination, "despite his having been committed to two state institutions in his past," thereby foregoing a possible insanity defense; and (6) trial counsel failed to "force" the State to try all the Petitioner's charges in one trial. The Petitioner also alleges prosecutorial misconduct, stating that the prosecutor retaliated against him because he had filed a federal lawsuit against the district attorney's office. Specifically, the Petitioner states that the prosecutors withdrew a six-year plea offer in retaliation over the lawsuit and refused to allow the defense access to the fingerprint evidence for the same reason. We conclude that the trial court properly denied post-conviction relief. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and J.C. McLIN, JJ., joined.

David Hopkins, Nashville, Tennessee, for the appellant, Michael Anthony Bush.

Paul G. Summers, Attorney General and Reporter; Blind Akrawi, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Bret Gunn, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Background

A) Trial

This case arises from a series of five aggravated burglaries in the Nashville area during October of 2001. The Petitioner was tried by a jury on one count of aggravated burglary. The evidence showed that the Petitioner broke a window and entered the residence of Mr. George Harrien and his girlfriend, Tina Dyer. The Petitioner took electronic equipment, clothing, athletic shoes, jewelry, compact discs, alcohol bottles, and a .22 caliber rifle. The home was left in disarray, and an entertainment center was damaged. The crime was linked to the Petitioner by his fingerprints, which were found on the shattered glass from the broken window at the residence. The homeowners testified that they did not know the Petitioner, they did not authorize or permit his entry into their home, and they did not know of any reason why his fingerprints would otherwise be present on their window panes.

B) Guilty Pleas

Following the Petitioner's conviction for aggravated burglary, the Petitioner pled guilty to four other aggravated burglaries. Although the record contains only brief descriptions of these cases, they all involve the unlawful breaking and entering of residences to commit thefts. All of these cases were also linked to the Petitioner by fingerprints, and none of the homeowners knew the Petitioner, authorized his entry, or knew of a reason for his fingerprints to be found at their homes.

C) Post-Conviction Hearing

1. Independent Fingerprint Analyst

At the post-conviction hearing, the Petitioner testified that his trial counsel failed to adequately investigate the facts of his case by not hiring an independent fingerprint analyst to counter the State's fingerprint evidence. The Petitioner stated that he told his trial counsel that he wanted an independent fingerprint analyst and that trial counsel "said she would do it, and never did it." When asked what the fingerprint expert would be able to prove, the Petitioner responded, "I don't know," but stated that an expert should have been used anyway to "put the State to a test."

Trial counsel testified that the Petitioner never denied that the fingerprints at the homes were his. Trial counsel testified that the only reason that the Petitioner appeared to continue to want an expert fingerprint analyst was to show that the glass was found outside the home, thereby failing to prove that the Petitioner entered the home. Trial counsel testified that she did look at the State's fingerprint evidence and that nothing indicated to her that an independent expert was necessary. Trial counsel stated that she did not recall telling the Petitioner that the State would not allow him

to have an independent investigation of the fingerprints; however, trial counsel confirmed that she did have to file a motion to compel in the matter to be able to discover the fingerprint evidence.

2. Pre-trial Advice on Fingerprint Evidence

The Petitioner presented conflicting testimony about whether he knew of the State's fingerprint evidence against him before trial. On two occasions during the post-conviction hearing, the Petitioner claimed that he did not know that the State had extensive fingerprint evidence against him linking him to the burglaries. He stated that he would have accepted a plea bargain instead of going to trial if he had known that the State had fingerprint evidence.

However, the Petitioner also testified at the post-conviction hearing that he did know that the State had fingerprint evidence from the multiple burglary locations. The Petitioner testified that he discussed the fingerprint evidence with both his trial counsel and an investigator with the public defender's office within "two days" after he was arrested. The Petitioner testified that he believed that, because the fingerprint evidence was all that linked him to the scene of the crime, he had a strong case. Additionally, the Petitioner testified that he discussed whether the fingerprints could be tested by an independent expert before trial. The Petitioner stated that his trial counsel repeatedly told him that the State could not prove that the fingerprints were his.

On cross-examination, the Petitioner again stated that he was aware before trial that the State did have his fingerprints. The Petitioner also testified that he knew of a six-year plea offer from the State and that his trial counsel advised him to take it. The Petitioner stated that he was aware the district attorney had told his trial counsel that there was a time limit on accepting the plea and that, eventually, the district attorney told him he would no longer offer that plea agreement.

Trial counsel testified that the district attorney made a plea offer for six years but that the Petitioner was "adamant" that he would not plead guilty even though he knew of the fingerprint evidence. Trial counsel testified that she suggested that the plea offer was "the best resolution to his case" but that he did not have to plead guilty and could go to trial. Trial counsel testified that, once the Petitioner refused the six-year offer, it was "gone." Then, the State offered twenty years, and trial counsel countered with a twelve-year offer. Trial counsel stated that, once the six-year offer was rejected, "the best resolution we have ever received [from the State] right before trial was probably eighteen [years]" for all of the ten burglary and aggravated burglary charges. Trial counsel stated that, once the Petitioner realized that the six-year offer was no longer available, "he became much more cooperative in getting ready for trial." Once the Petitioner was convicted of one count of aggravated burglary, trial counsel requested another plea bargain for the remaining charges, which the Petitioner ultimately received and accepted.

3. Right to Testify

The Petitioner testified that his attorney did not allow him to testify at trial. The Petitioner stated that he told his attorney he wanted to testify, and that they discussed whether he would testify, but that his attorney advised him that the State could use prior bad acts to impeach him. When he was asked what his testimony would have been, the Petitioner stated, "I don't know." The Petitioner

further stated that he would have explained why he did not burglarize these homes and would have stated that his fingerprints must have been there because he was “working with some guys” on these homes.

On cross-examination, the Petitioner stated that his trial counsel never told him he could not testify at trial but that she only told him that he could be impeached by his prior convictions. The Petitioner testified that he believed that his trial attorney was wrong about this because the judge ruled that the State could not “bring up [his] past in front of the jury.” Nonetheless, the Petitioner stated that he understood it was his decision whether to testify and that he alone made that decision. The Petitioner stated that he did recognize his handwriting on a form stating that he did not want to testify but that he could not recall signing a waiver.

Also on cross-examination, the Petitioner stated that he wanted to tell the jury that “some guys went and came downtown and picked [him] up at the Nashville Union Mission and [they] went cleaning up.” The Petitioner wanted to tell the jury that the home that he was on trial for burglarizing must have been one he had cleaned.

Trial counsel testified that she discussed in depth with the Petitioner his right to testify. Trial counsel stated that she attempted to explain the various distinct types of impeachment evidence that may be used against him under different rules of evidence. Trial counsel spent two hours with the Petitioner “practicing” his testimony, which “did not go well.” After this session, the Petitioner “agreed . . . that . . . it was best not to testify.” Trial counsel testified that “he would not make a very good witness.” Trial counsel stated that, at trial, she told the Petitioner once more that he had the “absolute right to testify.” Trial counsel testified that the Petitioner again stated that he did not want to testify.

4. Jury Instructions

The Petitioner testified that his trial counsel requested a jury instruction on aggravated trespass and trespass, which the judge did not allow because the Petitioner did not testify at trial. The Petitioner testified that he discussed this predicament with his attorney and stated that he “wanted to take . . . the stand and say . . . something in my behalf to the jury.” The Petitioner again stated that he would have said that his fingerprints must have been at these locations because he “was working with some guy helping him clean up.”

Trial counsel testified that she did request jury instructions on trespass and aggravated trespass. The trial court ruled that he would have to testify to receive the instructions. Trial counsel testified that she discussed this situation with her client, that he still did not want to testify, and that the court therefore did not issue these instructions.

5. Mental Evaluations

The Petitioner testified that he discussed with his trial counsel whether he needed a mental evaluation because he “had been committed to two state . . . mental institutions in [his] lifetime” for “alcohol and drug treatment.” The Petitioner stated that his trial counsel never requested a mental evaluation. When asked what he believed the mental evaluation would show, the Petitioner responded, “I don’t know”; the Petitioner then stated that he believed that he would have been able to present an insanity defense at trial.

On cross-examination, the Petitioner again stated that he requested a mental evaluation from his trial counsel but that she did not obtain one. The Petitioner stated that he had not obtained a mental evaluation before the post-conviction hearing and thus could not present any evidence of his insanity.

Trial counsel testified that she saw no reason for a mental evaluation but that she had a licensed clinical social worker from her office interview the Petitioner. The social worker advised that a mental evaluation did not appear necessary. Eventually, trial counsel opined that “a mental issue was not going to be fruitful” and was especially inconsistent with the Petitioner’s mistake-of-fact claim that he had worked at the burglarized residences and that this explained the finding of his fingerprints at the scenes.

6. Joinder

The Petitioner testified, quoting Rule 8 of the Tennessee Rules of Criminal Procedure, that all of his burglary and aggravated burglary charges should have been tried together because of the mandatory joinder requirements. The Petitioner testified that he told his trial counsel that he wanted all of his indicted charges tried together but that “she told [him that he] was going to end up with about 150 years if [he] tried them all together.” The post-conviction court found that Rule 8(a) did not mandate joinder of the indicted offenses and that the parties properly agreed to sever the actions under Rule 14.

7. Prosecutorial Misconduct

The Petitioner testified that the State committed prosecutorial misconduct by withdrawing a plea bargain offer of six years and refusing to “turn[] over” fingerprint evidence to the defense. The Petitioner asserts that the State did so because he had previously filed a federal civil rights lawsuit against the district attorney. Although the lawsuit was dismissed, the Petitioner stated that his attorney in the federal case told him that “the D.A. was mad at [him] for filing a civil lawsuit.” The Petitioner stated that the district attorney withdrew the plea agreement only “[a]fter [he] filed the [f]ederal lawsuit.” The Petitioner specifically stated that the State did not provide the fingerprint evidence to him because “the prosecutors were vindictive” because he had filed the previous lawsuit. The Petitioner testified that his trial counsel excused the State’s conduct and stated that the State did not have his fingerprints.

8. Post-Conviction Court's Findings

The post-conviction court determined that the Petitioner received the effective assistance of counsel. With regard to the Petitioner's allegation that his trial counsel failed to obtain a fingerprint expert to pursue further analysis, the post-conviction court found that the Petitioner had "failed to demonstrate any prejudice" because "to date there has been no independent analysis conducted."

In response to the Petitioner's allegation that his trial counsel did not allow him to testify at trial, the post-conviction court found that the "Petitioner conceded that his trial counsel did not prevent him from testifying and that it was his own decision." The trial court also noted that the Petitioner was informed of his right to testify at a jury-out hearing and that the Petitioner then waived his right to testify.

With regard to the Petitioner's claim that he should have received jury instructions for the lesser included offense of trespass, the trial court found that "there was no basis to provide the lesser-included offenses instruction."

In response to the Petitioner's allegation that his trial counsel should have requested a mental evaluation, the post-conviction court found that the "Petitioner conceded that he knew that he was breaking into a building at the time he did so and that he knew it was wrong." The post-conviction court found that the "Petitioner also conceded [that] he is aware of all of the Court participants." Further, the post-conviction court found that, "since Petitioner did not submit to a psychological evaluation prior to the post-conviction hearing, there were no psychological evaluation results for the [c]ourt to review; thus, Petitioner has failed to establish prejudice."

With regard to the Petitioner's contention that his trial attorney should have joined all of the Petitioner's counts together, the trial court found that "[t]he ten counts at issue in this case involved different burglaries on different dates thus trying them together would not benefit Petitioner." See Tenn. R. Crim. P. 8(a). The post-conviction court also found that "[t]he parties agreed to sever the counts pursuant to Rule 14 [of the Tennessee Rules of Criminal Procedure.]"

In response to the Petitioner's allegation of prosecutorial misconduct, the post-conviction court found that "the prosecution did not engage in any misconduct by withdrawing the original offer." The trial court found that arrangement was that, "[w]hen the case was bound over, Petitioner chose to strike the information thereby negating the original offer."

With regard to the Petitioner's assertion that his guilty plea was entered involuntarily, the post-conviction court found that, "[b]ased upon Petitioner's responses during the plea colloquy as well as the Court's observation of Petitioner's demeanor, the Court finds that Petitioner was aware of the plea process and its ramifications and that he knowingly and voluntarily entered his guilty plea."

Analysis

I. Ineffective Assistance of Counsel

The Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution guarantee a criminal defendant the right to representation by counsel. State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Both the United States Supreme Court and the Tennessee Supreme Court have recognized that the right to such representation includes the right to “reasonably effective” assistance, that is, within the range of competence demanded of attorneys in criminal cases. Strickland v. Washington, 466 U.S. 668, 687 (1984); Burns, 6 S.W.3d at 461; Baxter, 523 S.W.2d at 936.

A lawyer’s assistance to his or her client is ineffective if the lawyer’s conduct “so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland, 466 U.S. at 686. This overall standard is comprised of two components: deficient performance by the defendant’s lawyer and actual prejudice to the defense caused by the deficient performance. Id. at 687; Burns, 6 S.W.3d at 461. The defendant bears the burden of establishing both of these components by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); Burns, 6 S.W.3d at 461. The defendant’s failure to prove either deficiency or prejudice is a sufficient basis upon which to deny relief on an ineffective assistance of counsel claim. Burns, 6 S.W.3d at 461; Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

This two-part standard of measuring ineffective assistance of counsel also applies to claims arising out of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58 (1985). The prejudice component is modified such that the defendant “must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” Id. at 59; see also Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

In evaluating a lawyer’s performance, the reviewing court uses an objective standard of “reasonableness.” Strickland, 466 U.S. at 688; Burns, 6 S.W.3d at 462. The reviewing court must be highly deferential to counsel’s choices “and should indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” Burns, 6 S.W.3d at 462; see also Strickland, 466 U.S. at 689. The court should not use the benefit of hindsight to second-guess trial strategy or to criticize counsel’s tactics, see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982), and counsel’s alleged errors should be judged in light of all the facts and circumstances as of the time they were made. See Strickland, 466 U.S. at 690; Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

A trial court’s determination of an ineffective assistance of counsel claim presents a mixed question of law and fact on appeal. Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). This Court reviews the trial court’s findings of fact with regard to the effectiveness of counsel under a de novo standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. Id. “However, a trial court’s conclusions of law—such as whether counsel’s performance was deficient or whether that deficiency was prejudicial—are reviewed under

a purely de novo standard, with no presumption of correctness given to the trial court's conclusions." Id. (emphasis in original).

1. Independent Fingerprint Analyst

First, the Petitioner asserts that he received the ineffective assistance of counsel because his attorney did not request an independent fingerprint analysis. The Petitioner theorizes that an expert could have determined why the Petitioner's fingerprints were at the scene of the aggravated burglary. The Petitioner does not dispute that the fingerprints are his; thus, further expert identification would appear irrelevant. Even so, the Petitioner's trial counsel made all reasonable efforts to examine the fingerprint evidence, including meeting with the officers to see the evidence and discussing the findings with another fingerprint analyst. The Petitioner's trial counsel made the decision that, because the Petitioner was not actually claiming that the fingerprints were not his, a fingerprint expert was not needed in this case. Furthermore, the Petitioner did not present any evidence at the post-conviction hearing that demonstrated that he suffered prejudice because of the lack of further fingerprint testing. This issue has no merit.

2. Pre-Trial Advice on Fingerprint Evidence

Next, the Petitioner alleges that he received the ineffective assistance of counsel because he was not properly advised during the plea bargaining stages that the State had extensive fingerprint evidence linking him to the majority of the indicted crimes. However, the Petitioner admitted numerous times in the post-conviction hearing that he discussed the fingerprint evidence at length with both his trial counsel and an investigator. The Petitioner stated that he knew of this evidence as soon as two days after he was arrested. Indeed, the Petitioner and his attorney had pre-trial disagreements over the independent fingerprint analyst, showing that the Petitioner knew of this evidence. Trial counsel testified that she recommended that the Petitioner accept the plea bargain in light of this fingerprint evidence but that the Petitioner was "adamant" about going to trial. The Petitioner has failed to demonstrate that his trial counsel's representation was deficient. This issue has no merit.

3. Right to Testify

Next, the Petitioner asserts that he received the ineffective assistance of counsel because he was denied his right to testify. The evidence from the post-conviction hearing does not establish any constitutional violation. The Petitioner and his attorney discussed his "absolute right" to testify on multiple occasions before the trial and during the trial. Trial counsel discussed the possible impeachment evidence that the State might be able to use against the Petitioner. Trial counsel completed practice testimony sessions with the Petitioner. Eventually, trial counsel advised the Petitioner that she did not believe it was in the Petitioner's best interest to testify at trial. However, trial counsel allowed the Petitioner to make the decision not to testify on his own, and the Petitioner signed a written waiver stating that he "voluntarily and personally" decided not to testify after being

advised of the “advantages and disadvantages of testifying.” The Petitioner admitted that he was the one who made the final decision not to testify. This issue has no merit.¹

4. Jury Instructions

Next, the Petitioner asserts that he received the ineffective assistance of counsel because his attorney was unable to obtain jury instructions on lesser-included offenses. The record from the post-conviction hearing demonstrates that the Petitioner’s trial counsel attempted to obtain the instructions for aggravated trespass and trespass. However, the trial court ruled that the State’s proof did not support the lesser-included offense instructions. The trial court likewise found that the lesser-included offense instructions were not supported by the evidence at trial. This issue is without merit.

5. Mental Evaluation

Next, the Petitioner alleges that he received the ineffective assistance of counsel because his trial attorney did not request a mental evaluation despite the fact that he informed her that he had been committed twice to mental institutions for drug and alcohol rehabilitation. Although trial counsel admitted that she noticed slight problems with his focus and his need for further time to answer complex questions, trial counsel testified that she did not believe that a mental evaluation was necessary. Despite her opinion, trial counsel scheduled an appointment to meet with a licensed clinical social worker, who agreed that the Petitioner did not need a mental evaluation. Trial counsel therefore did not request a mental evaluation of the Petitioner. The trial court found that the Petitioner failed to show any prejudice from the failure of trial counsel to seek a mental evaluation. The record supports this finding. This issue is without merit.

6. Joinder

Next, the Petitioner claims that he received the ineffective assistance of counsel because all of his offenses were not joined and tried together. The Petitioner’s argument in the trial court relied on Rule 8(a) of the Tennessee Rules of Criminal Procedure; however, the trial court found that Rule 8(a) did not mandate the joinder of these offenses and that the parties agreed to a Rule 14 severance of the trials. On appeal, the Petitioner’s brief does not cite any authority as to why these separate charges should have been joined. His argument, in its entirety, is one sentence: “Trial counsel was also ineffective by failing to require the State to try all of his counts at the same trial.” Rule 27(a)(7) of the Tennessee Rules of Appellate Procedure requires the Petitioner to cite authority to support the argument in his brief. Furthermore, Rule 10 of the Rules of the Court of Criminal Appeals states that “[i]ssues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court.” As such, the issue of whether the Petitioner received the effective assistance of counsel with regard to the joinder of the offenses is waived on appeal.

¹In its order denying post-conviction relief, the trial court quotes at length from the “transcript” of the Petitioner’s waiver of his right to testify, which is referred to as “late-filed exhibit 4.” The colloquy quoted between the Petitioner and the trial court clearly appears to be in accordance with Momon v. State, 18 S.W.3d 152 (Tenn. 1999). We note, however, that “late-filed exhibit 4” is not contained in the record on appeal.

II. Prosecutorial Misconduct

Finally, the Petitioner alleges prosecutorial misconduct. The Petitioner claims that the district attorney's office withdrew a six-year plea offer and refused to disclose fingerprint evidence to the defense out of retaliation for a federal lawsuit that the Petitioner filed against the district attorney's office. The trial court found that no prosecutorial misconduct occurred because the State did allow trial counsel to view the fingerprint evidence and because the Petitioner himself rejected the six-year offer. The evidence does not preponderate against the trial court's findings. On appeal, the Petitioner has cited no authority to support the argument of prosecutorial misconduct. Thus, the Petitioner has waived this issue on appeal.

Conclusion

Based upon the foregoing authorities and reasoning, we affirm the judgment of the trial court.

DAVID H. WELLES, JUDGE